

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D C 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

Southwestern Bell
Telephone Company

Tariff F.C.C. No. 73

Transmittal Nos.
2433 and 2449

CC Docket No. 95-140

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OPPOSITION TO DIRECT CASE OF
SOUTHWESTERN BELL TELEPHONE COMPANY

Pursuant to the Order Designating Issues for Investigation issued by the Common Carrier Bureau ("Bureau"),¹ AT&T Corp. ("AT&T") hereby files its Opposition to the Direct Case of Southwestern Bell Telephone Company (Southwestern Bell). In the above-referenced tariff transmittals, Southwestern Bell proposes to modify its interstate access tariff to provide offerings at rates other than those already contained in its tariffs in response to requests for proposals ("RFPs") submitted by Southwestern Bell's customers (referred to herein as the "RFP tariffs"). AT&T and others filed petitions to reject or suspend the RFP tariffs.² Specifically,

¹ Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, Transmittal Nos. 2433 and 2449, Order Designating Issues for Investigation, DA 95-1867 (rel. August 25, 1995) ("Investigation Order"). By Order dated June 26, 1995, the Bureau suspended for five months the pending tariffs and initiated an investigation into the lawfulness of those tariffs. Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, Transmittal Nos. 2433 and 2449, Order, DA 95-1445 (rel. June 26, 1995).

² Petitions against each or both of the above transmittals were filed by the Association for Local Telecommunications Services, AT&T, MCI, Sprint and Teleport Communications Group

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AT&T showed that the Commission had already rejected as unlawful a substantially similar Southwestern Bell access tariff filing (i.e., ICB-type tariffs in response to a bona fide request from a customer), because those provisions were too ambiguous and indefinite to satisfy the Commission's tariff requirements. In addition, AT&T showed that Southwestern Bell's "competitive necessity" justification for the RFP tariffs was clearly misplaced, because Southwestern Bell had failed to factually support the threshold showing that the proposed tariffs respond to an equally or lower priced offering from a competitor. Finally, AT&T demonstrated that, because the RFP tariffs would give Southwestern Bell broad discretion to determine whether, and on what terms, to offer its RFP tariff services to other access customers, those proposed tariffs do not satisfy the competitive necessity test's requirement that such a proposal "meet competition without undue discrimination."³

In its Direct Case, Southwestern Bell has submitted no information which would dispel the serious concerns of lawfulness raised by AT&T (and the other petitioners), and by the Bureau in its Investigation Order. As shown below, Southwestern Bell's RFP tariffs remain vague and ambiguous, leaving significant, unchecked discretion to Southwestern Bell in determining when, and upon what terms, to offer its RFP access pricing to customers. Southwestern Bell has also failed to explain why the Commission should depart from its policy of allowing local exchange companies ("LECs") pricing flexibility for access services only in instances where substantial competition exists and under nondiscriminatory, generally available

³ See AT&T Petition (Transmittal No. 2433), filed March 14, 1995, and AT&T Petition (Transmittal No. 2449) filed May 9, 1995.

tariffed offerings. Finally, it has not provided sufficient information to meet the standards required of a competitive necessity showing. For these reasons, the Commission should reject Southwestern Bell's RFP tariffs.

I. Tariff Language Vagueness and Ambiguity

In response to the Bureau's request that it define the standards that it would use to determine a "competitive bid situation," Southwestern Bell stated that "there is no need to create standards for a competitive bid situation," asserting in effect that the mere existence of an RFP creates enough of a competitive threat to Southwestern Bell to justify an RFP tariff response.⁴ Southwestern Bell goes on to claim that questions about the existence and number of competitive bidders, and the terms and conditions of the competitive bids are "not relevant to the competitive facts facing SWBT."⁵ On this basis, it has declined to commit to obtaining such information from its RFP customers limiting or specifying the access services available under its RFP tariff, or identifying the restrictions on the general availability of discounted services to be offered under those tariffs. In effect, Southwestern's response to each of the Bureau's questions related to tariff ambiguity is "Not Applicable."

By refusing to clarify in its tariffs the standards under which it will assess potential competitive situations, and similarly refusing to specify the access services (including the rates, terms and conditions) that would be available under its

⁴ Direct Case at 5-8

⁵ Id. at 6.

RFP tariff,⁶ Southwestern Bell is asking the Commission to approve a “trust me” approach to determining when a bona fide RFP has been issued and the reasonableness and lawfulness of its competitive response.⁷ Because Southwestern Bell’s RFP tariffs are so ambiguous on essential tariff terms and conditions, the opportunity for manipulation of those tariffs, on the part of customers and/or Southwestern Bell, is apparent. Moreover, not only is there no check on whether RFPs submitted to Southwestern Bell are legitimate, there is also no assurance to customers that Southwestern Bell will not refuse to respond to their bona fide RFPs with an RFP tariff offering. In sum, Southwestern Bell has not supplied any evidence or explanation to the Bureau upon which the Bureau can conclude that the tariffs are clear and specific as to their terms; the RFP tariffs remain unlawfully ambiguous and indefinite on their face and warrant rejection on this basis alone.

II. Pricing Flexibility

Southwestern Bell asserts that the mere existence of an RFP is evidence enough that competition has developed, justifying even greater pricing and rate structure flexibility than has previously been accorded under the Commission’s zone density pricing and volume and term discount policies.⁸ According to

⁶ See id. at 8-10

⁷ Apparently realizing that its answers fall far short of being responsive to the Bureau’s questions, Southwestern Bell (Direct Case at 7, 8-9) offered to “clarify” its tariff, which clarifications it would file “at the Bureau’s direction.” This offer of future clarifications only serves as an admission by Southwestern Bell of the inadequacies of its current tariff filings, and does not provide any justification for the Bureau to determine that Southwestern Bell has met its tariff filing requirements.

⁸ Direct Case at 14-15.

Southwestern Bell, because competition exists in the form of individual, ad hoc customer RFPs, Southwestern Bell must be permitted to respond with individualized, ICB-type services.⁹

Southwestern Bell's response fails to address the gravamen of the Bureau's concerns, and does nothing to advance its claim that its ICB-like RFP tariffs are consistent with the Commission's flexible pricing policies. It is no surprise that if a customer comes to a LEC with a request for specialized pricing and has a potential competitive alternative to consider, the LEC could likely obtain that customer's business if it were to lower its prices to that customer to a more cost-based rate than its published averaged tariff prices. However, the Commission, in a series of fully briefed and well-reasoned policy dockets, found that it is not in the public interest to give LECs such unfettered pricing flexibility. Rather, the Commission has held that more limited pricing flexibility -- specifically limited to instances in which expanded interconnection features are available to competitive access providers -- would meet the Commission's dual goals of (1) giving the LECs more freedom to compete where competition has taken hold; and (2) protecting developing access providers from being foreclosed from competing in the marketplace because of targeted competitive offerings of LECs.¹⁰ Indeed, nowhere in its response does Southwestern Bell

⁹ Id. at 11-13.

¹⁰ See, e.g., Expanded Interconnection with Local Telephone Company Facilities, Third Report and Order, 9 FCC Rcd 2718, 2731 (1994) ("Third Report and Order"); Expanded Interconnection with Local Telephone Company Facilities, Second Report and Order and Third Notice of Proposed Rulemaking, 8 FCC Rcd 7374, 7422-25 (1993), *vacated in part and remanded sub nom. Bell Atlantic v. FCC*, No. 93-1743 (1995 WL 311741 (D.C. Cir. 1995)); Expanded Interconnection with Local Telephone

acknowledge the public interest concern, reflected in the Commission's zone density pricing and volume and term discount orders, in ensuring a marketplace in which competitive access providers can gain a meaningful foothold prior to increased pricing flexibility for LECs. At bottom, Southwestern Bell reinforces its position that it must have the pricing flexibility to respond to every alleged competitive threat, no matter how small or how undocumented, and to do so with highly customized, ICB-type tariffs. However, until such time as the Commission determines that the market for the services that Southwestern Bell is seeking to offer under its RFP tariffs (which service offer is itself unclear) is substantially competitive, there is no basis in Commission precedent to permit Southwestern Bell's RFP ICB-type tariffs to take effect.¹¹

(footnote continued from previous page)

Company Facilities, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992), *further recon. on Commission's own motion*, 8 FCC Rcd 127 (1992), *further recon.*, 8 FCC Rcd 7341 (1993), *vacated in part and remanded sub nom. Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

¹¹ See Third Report and Order at 2731 ("The Commission has limited contract carriage to services found to be 'substantially competitive'"); see also Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, 4 FCC Rcd 8634, 8644-45 (1989). In fact, Southwestern Bell has declined to take advantage of the increased pricing flexibility already accorded to it by the Commission. The Commission recently allowed the LECs greater flexibility to lower prices within the traffic sensitive and trunking baskets as well as for those categories that apply to density pricing zones. Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, First Report and Order, FCC 95-132, rel. April 7, 1995, paras. 408-411. Southwestern Bell has not lowered its published rates in response to this Order.

III. Competitive Necessity

In its Investigation Order (para. 15), the Bureau propounded a series of questions to Southwestern Bell to elicit evidence upon which it can base a decision as to whether a competitive necessity justification is an appropriate standard for judging Southwestern Bell's RFP tariffs and, if so, whether Southwestern Bell has satisfied the requirements of the competitive necessity test. In its Direct Case, however, Southwestern Bell has demonstrated neither the appropriateness of applying a competitive necessity standard, nor its compliance with that standard.

Specifically, in response to the Bureau's question as to "why competitive necessity justifies participation in a competitive bidding situation," Southwestern Bell replied that "competition" justifies its participation in a competitive bidding situation; in response to why competitive necessity justifies LEC pricing action taken "before the existence of a specific offer from a competing provider," Southwestern Bell asserted that it must be able to "fully compete in the RFP process...on the basis of a representation by the customer that competitive alternatives exist" or else it will be "shut out" in response to the request for "an explanation of how in a competitive bidding situation an offer by SWBT could be reasonably designed to meet competition without undue discrimination," Southwestern Bell merely stated that "SWBT's offers... would be reasonably designed to meet competition without undue discrimination."¹² These responses offer no

¹² Direct Case at 16-18. Southwestern Bell asserted (at 16) that "[t]he existence of alternate supply guarantees that SWBT's prices will be reasonable."

explanation as to why the Commission should apply the competitive necessity justification -- a specific legal standard established by the Commission to address certain instances of demonstrable competitive actions¹³ -- to this tariff filing. By Southwestern Bell's own device these tariffs extend well beyond the pricing limitations established in the Commission's prior policy dockets and afford Southwestern Bell virtually unlimited pricing flexibility without any articulated or verifiable competitive benchmark.

Southwestern also failed in its Direct Case to demonstrate that its tariff filing meets the specific criteria of the competitive necessity test. First, Southwestern Bell provided no explanation as to how it will ensure that an equal or lower priced offering will be generally available from a competitor. Southwestern Bell merely assumes that competitive bids will be offered by competitors who will look up Southwestern Bell's published prices and "simply bid a sufficient amount lower to win the business."¹⁴ This reliance on a "scenario" in which Southwestern Bell's tariff rates will be "assumed" to be higher than the prices of potential competitors, and the additional unsupported assumption that those competing carriers will make their offers generally available (neither of which assumptions Southwestern Bell is willing to verify)¹⁵ provides none of the evidence required to satisfy this element of the competitive necessity test.

¹³ See Private Line Rate Structure and Volume Discount Practices, 97 F.C.C.2d 923 (1984).

¹⁴ Direct Case at 17

¹⁵ Id. at 18.

Nor do Southwestern Bell's further responses offer any justification under the remaining prongs of the competitive necessity test, which require that the carrier's proposed offering "meet competition without undue discrimination" and "contribut[e] to reasonable rates and efficient services for all users."¹⁶ Southwestern Bell asserts that the discriminatory nature of its RFP offerings will be held in check by the marketplace itself:

"In highly competitive markets, prices will tend to be lower (consistent with unregulated competitive markets). If competition is limited (or perhaps nonexistent) prices will tend to be close (if not identical) to averaged tariff rates. Thus, undue discrimination is avoided by the RFP process itself."¹⁷

However, as noted above, Southwestern Bell has refused to offer any standards by which it intends to judge the competitiveness of the market, or the terms and conditions of competitive bids. Given that Southwestern Bell intends to set rates, terms and conditions without any concrete evidence as to the offers of its competitors (or even as to whether any competitive offers actually exist), it will be impossible to determine whether the discrimination inherent in its proposed RFP tariffs is reasonable.

Finally, Southwestern Bell asserts that the RFP rates will contribute to reasonable rates and efficient services for all users by permitting it to retain customers that it would otherwise lose to competition.¹⁸ Because it will be impossible to determine whether Southwestern Bell is winning business that it otherwise might

¹⁶ 97 F.C.C.2d 923

¹⁷ Direct Case at 17-18.

¹⁸ Id. at 18-19.

lose, or merely pricing its access services more attractively to "selected" customers (or, on the other hand, denying RFP access services to qualifying customers), Southwestern Bell has failed to show that there will be an economic benefit to all of its access customers

CONCLUSION

In its Direct Case, Southwestern Bell has confirmed the failings of its RFP tariffs -- they are ambiguous and leave inordinate discretion in the hands of Southwestern Bell in deciding to whom, and under what terms and conditions, to provide service; they present a pricing scheme that goes well beyond the pricing flexibility granted to LECs by the Commission in previous policy decisions; and, if implemented, they would not meet a competitive necessity showing, but instead permit Southwestern Bell to squash competition in its nascent stage. For all of these reasons, the Commission should reject Southwestern Bell's proposed RFP access tariffs.

Respectfully submitted,

AT&T Corp.

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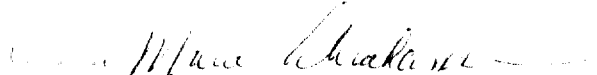
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September 25, 1995

CERTIFICATE OF SERVICE

I, Ann Marie Abrahamson, do hereby certify that on this 25th day of September, 1995, a copy of the foregoing "Opposition to Direct Case of Southwestern Bell Telephone Company" of AT&T Corp. was mailed by U.S. first class mail, postage prepaid, to the parties listed below.

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